82-471

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

WILMER C. JORDAN
and SHELDON R. WAXMAN,

Petitioners,

v.

VICTOR MANEIKIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Counsel for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

Is the refusal to reinstate a counterclaim, which was voluntarily dismissed in order to obtain a prompt trial, an appealable order?

Is it a violation of due process to assess costs on appeal under 28 U.S.C. § 1927 against appellant's lawyer without a hearing?

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In the
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OCTOBER TERM, 1982

No.

WILMER C. JORDAN
and SHELDON R. WAXMAN,

Petitioners,

v.

VICTOR MANEIKIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari or in the alternative a Writ of Mandamus be issued concerning the judgment of the Court of Appeals for the Seventh Circuit entered on May 18, 1982.

OPINION BELOW

The Per Curiam published opinion of a panel of the Seventh Circuit can be found at ..... F.2d ..... (Docket No. 80-2528 May 14, 1982). A Petition for Rehearing En Banc (see Appendix) was filed on June 1, 1982 and was denied on June 16, 1982. See Appendix.

JURISDICTION

Jurisdiction is predicated on Title 28 U.S.C. Section 1254(1); 62 Stat. 928. The supervisory jurisdiction of the Court over inferior Courts of Appeal is also invoked. This appeal is taken within 90 days, less the time tolled by the Petition for Rehearing En Banc pursuant to 28 U.S.C. § 2101(c).

STATEMENT

In an interlocutory appeal (but one which had sufficient finality, under this Court's opinions*) a panel of the Court—convened only 2 weeks prior to issuance of the Per Curiam published opinion in an appeal already 2 years old, without oral argument**—gratuitously found that the appeal was frivolous and assessed costs under 28 U.S.C. § 1927 against the attorney.*** Wilmer C. Jordan petitions the Court with respect to the holding that his request for appellate review of a final decision that denied him reinstatement of his voluntarily dismissed counterclaim was from an unappealable interlocutory order.

Sheldon R. Waxman, Jordan's attorney, seeks review of that ruling which without a hearing imposed double costs on him for an alleged frivolous appeal.

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* See cases cited in the Appendix, "Petition for Rehearing with En Banc Suggestion."

** Although oral argument was repeatedly requested. See, Appendix.

*** Based on a theory that the attorney had foreknowledge that the appeal was from a nonappealable order.

REASONS FOR GRANTING THE WRIT

I.

JORDAN

In order to obtain a prompt trial on the Respondent's claim that the royalty agreement concerning his patented carburetor device was fraudulently induced, Jordan voluntarily dismissed his counterclaim, which accused the Respondent of tortiously destroying his business by the pursuit of sham and frivolous litigation and harassing discovery. The lawsuit was filed in 1974 and has never been tried. Respondent's counsel had claimed that it was necessary to take exhaustive discovery because of the counterclaim and it was because of that "needed" discovery that delayed the trial.

One year after (6 years after the lawsuit had been filed) the voluntary dismissal and no closer to a trial, Jordan requested reinstatement of his counterclaim. It was denied and he appealed in 1980. His appeal, without oral argument, after a lengthy discussion about whether it was appealable, was declared to be frivolous after 2 years of Appellate cogitation.

For the reasons stated in the Petition For Rehearing, etc. (see Appendix) the denial of the reinstatement of the voluntarily dismissed counterclaim was in error. Full briefing on this issue is required because the panel's decision conflicts with this Court's rulings on the subject.

II.

SHELDON R. WAXMAN

Without a prior hearing concerning a highly complicated legal matter the panel awarded double costs under Title 28 U.S.C. § 1927 against the lawyer. This is a new technique to silence obstreperous lawyers and interfere with attorney-client relationships and, therefore, should be reviewed by this Court in order to avoid additional embarrassment because of faulty logic.*

The California Supreme Court recently held that the issuance of fines against an appellate lawyer should be avoided, unless the circumstances are exceptional, because it would restrict access to appellate review. *In re Marriage of Flaherty,* ..... Cal. 3d ..... (S.F. 24307, June, 1982). Under *all* circumstances the Supreme Court of California stated the appellate courts must provide due process to the lawyer.**

Because of the failure of the Court of Appeals to provide even the most minimal due process protections, an alternative Writ of Mandamus*** to order an appellate hearing on the "frivolousness" issue is requested as an alternative remedy to complete review of the issues by this Court.

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* How can there be a finding that the lawyer *knew* the appeal was nonappealable unless he is provided a hearing. The stigma of "frivolous lawyer" is actionable in this due process violation against the judges who "stepped outside" their appellate function in this case. See, *Stewart and Waxman* v. *SWP*, No. 81-1523.

** This was not done here.

*** This would be an exercise of supervisory jurisdiction.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari or, in the alternative Mandamus, should issue.

Respectfully submitted,

SHELDON R. WAXMAN,
on his own behalf and as counsel for co-petitioner
30 W. Washington Street
Chicago, Illinois 60602

APPENDIX

APPENDIX A

Per Curiam Opinion

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1982

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

VICTOR MANEIKIS,

Plaintiff-Appellee,

No. 80-2528 vs.

WILMER C. JORDAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-3788

Judge Prentice H. Marshall

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this appeal is DISMISSED, and the case is REMANDED to the district court for a determination of the amount of damages and costs to be paid to the appellee, with the direction that those expenses be assessed against the appellant's attorney, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 16, 1982

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

VICTOR MANEIKIS,

Plaintiff-Appellee,

No. 80-2[illegible]3 vs.

WILMER C. JORDAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-3788

Prentice H. Marshall, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant Wilmer C. Jordan, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

Filed—June 1, 1982

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2528

VICTOR MANEIKIS,

Plaintiff-Appellee,

v.

WILMER C. JORDAN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 3788

Hon. Stanley Rozkowski, *Judge*

PETITION FOR REHEARING WITH EN BANC SUGGESTION

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2528

VICTOR MANEIKIS,

Plaintiff-Appellee,

v.

WILMER C. JORDAN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 3788

Hon. Stanley Rozkowski, *Judge*

PETITION FOR REHEARING WITH EN BANC SUGGESTION

Wilmer C. Jordan and Shelly Waxman respectfully petition this Court for a Rehearing from the published decision dated May 14, 1982. The Rehearing is suggested *en banc*, as outlined below:

The issue in this appeal concerned the fact that a case filed in 1974 had never been tried, although a trial had been repeatedly requested by the defendants. After Jordans allegations of fraudulent conduct in the destruction of his patented invention by General Motors, Judge Marshall transferred this case to Judge Crowley two weeks before Judge Crowley resigned. As the "panel" should

have known, Judge Rozkowski is presently the Judge to whom the case is assigned.

Instead of treating the true issue, a "panel" comprised of two individuals, who were not members of this Court when this appeal was filed 2 years ago, chose to adopt a decision which attacked Jordan's counsel. It appears that the "panel" has intentionally attacked somebody's lawyer.

We contend that it is necessary to rehear the "panel's" decision *en banc* because in our opinion the Judges of the "panel" have obviously (under the facts) stepped outside their jurisdiction and, acted in their personal capacity. That they would make such a decision without allowing the accused lawyer an opportunity to defend himself makes the obvious due process violation more provable and the conduct more despicable.*

It is with disbelief that clients witness an incessant wrongful chastizement of their lawyer rather than a reasoned resolution of their claims. This activity only reinforces the clients continuing belief that their lawyer is doing his job.

Additionally, the fact that there are well known exceptions to the "finality" rule indicates that the "panel" was only headhunting for Jordan's lawyer. See *McGourkey* v. *Toledo & O. Cent. R.R. Co.* (46 U.S. 536, 545) (1892), *SWP* v. *Grubisic* (Appeal of Bernard Carey) 641 F. 2d 641 (7th Cir., 1980), cert. denied ..... U.S. ....., and, also, *Beneficial Finance Industrial Loan Corp.* v. *Cohen*, 337

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* That the "panel" did not exist at the time a "determination" was made on April 13, 1981 and again on June 10, 1981 "by the Court", that there was no need to have oral argument (even though plaintiff agreed to oral argument), clarifies the *ultra vires* nature of the decision adopted by the "panel". Mr. Jacob's boast that he had foreknowledge of the decision was recorded.

U.S. 541 (1949) progeny and see, also, 9 Moore's Federal Practices Par. 110.10 et seq.*

Furthermore, if the appeal here was so "obviously non-appealable" why was there such detailed and "long winded" disertation on the "obviously non-appealable" nature of the appeal? Did this require a "per Curiam" published decision? The "panel's" interest in the "more novel issue" becomes, thereby, purely gratuitous and, we submit, outside the concerns of the appellate function.** At least, however, we have clarified that the denial of the Motion to reinstate the counterclaim, since it was not final, did not terminate Jordan's rights to pursue his claims.

But, we need a clarification as to whether any order assessing damages and costs after remand is a final appealable order. We do not wish to compound the problem here by risking the further imposition of costs and damages.

Conclusion

A rehearing is requested.

Respectfully submitted,

WILMER C. JORDAN,

By: /s/ *Shelly Waxman*
SHELLY WAXMAN
His Attorney

and

By: /s/ *Shelly Waxman*
SHELLY WAXMAN, pro se

---

* Obviously, it was not felt that this "issue" was sufficiently important to require a response. Oral argument would have been the place to make a statement about this. If defendant's Motion for Leave to Supplement the Record had not been denied on March 31, 1981, although plaintiff's prior Motion to Supplement had been granted, the proof would have been available to the "panel".

** Section 1927 relief was not requested by plaintiff. That it was done without a hearing adds to its impropriety.

CERTIFICATE OF SERVICE

TO: John G. Jacobs
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Chicago, Illinois 60604

Robert K. Mayer
Attorney at Law
30 West Washington St., Suite 1
Chicago, Illinois 60602

I, ..., do hereby certify that I mailed a copy of the foregoing Petition, to the above named individual, at his respective address, with postage prepaid, on June ....., 1982.

/s/ Shelly Waxman

SHELLY WAXMAN & ASSOCIATES
30 West Washington Street
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Chicago, Illinois 60602
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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2528

VICTOR MANEIKIS,

Plaintiff-Appellee,

v.

WILMER C. JORDAN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 3788

Hon. Prentice Marshall, *Judge.*

JORDAN'S STATEMENT AS TO NEED OF ORAL ARGUMENT

(Filed on April 27, 1982)

NOW COMES the Defendant-Appellant, WILMER C. JORDAN, by and through his attorney, SHELLY WAXMAN, and makes the following suggested reasons why oral argument should be permitted in this case:

1. Judge Bauer denied Jordan's Motion to Supplement the Record on Appeal and chose to adopt the objections interposed by Appellee. This occurred, although Appellee's prior request for a supplementation of the Record was accomplished by Order of this Court *without objection* by Jordan.

2. Matters may arise at oral argument concerning the involvement of General Motors in this case as co-conspirators in the plan to destroy Jordan's patent utilizing Appellee as its method to accomplish it. These are matters which would have been available to the Court in the Supplemental Record which was requested of the Court.

3. Appellee has raised questions concerning the good faith of this appeal and is requesting punitive measures against Jordan. These are novel questions which, in view of Appellee's objection to a supplementation of the Record, indicate an appearance of potential maneuvering, which would be prevented by oral argument.

4. Jordan's Motion to Set Expedited Briefing Schedule and Suggestions for an Expedited Decision without Oral Argument filed on December 31, 1980 has not been acted on. Therefore, Jordan is not bound to the rationale utilized there for not having an oral argument.

5. If Appellee desired the dismissal of this Appeal for lack of jurisdiction, the usual practice is to move to dismiss the appeal at an early stage. This was not done and Jordan feels that this relates to the attempt to impose a "punitive aspect" into this case. See, Argument IV of the Appellee's Brief.

6. In particular, Appellee mistated the Record: (1) the original dismissal was *voluntary* on Jordan's part and without prejudice. There was no bargaining (or "meeting") to drop the discovery as a *quid pro quo* for this dismissal. Jordan wished to get the case to trial. (2) Furthermore, there was no previous denial of the Motion to Reinstate the Counterclaim. This has been his continuous position in this case.

7. Since, as determined by Judge Marshall, the *same* facts are involved, it is disingenuous for the Appellee to claim lack of discovery. The trial court has been most lenient and has allowed Appellee free reign in its discovery pursuits. That is why this case is still untried, although in 1975, Judge Marshall stated he would try it in a year.

8. We believe that oral argument, no matter how short, would be enlightening to the panel.

Respectfully submitted,

WILMER C. JORDAN

By: /s/ *Shelly Waxman*
SHELLY WAXMAN
His Attorney

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2528

VICTOR MANEIKIS,

Plaintiff-Appellee,

vs.

WILMER C. JORDAN and VAN METRE LUND,

Defendants-Appellants.

JORDAN'S SECOND MOTION TO SET ORAL ARGUMENT

(Filed on May 14, 1982)

NOW COMES WILMER C. JORDAN, by and through his attorney SHELLY WAXMAN, and moves for the immediate setting of oral argument in this appeal for the following reasons:

1. A prior motion to set oral argument was filed but has not been acted upon.

2. This appeal is crucial to the establishment of a trial date for this case filed in 1974.

3. The delay in the trial of this case is continuing to be a judicial embarrassment of major magnitude.

Respectfully submitted,
WILMER C. JORDAN,

By: /s/ *Shelly Waxman*
SHELLY WAXMAN
His Attorney

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILMER C. JORDAN
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v.

VICTOR MANEIKIS,

Respondent.

SUPPLEMENTAL
APPENDIX

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678 F.2d 720

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2528

VICTOR MANEIKIS,

Plaintiff-Appellee,

v.

WILMER C. JORDAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-3788—Prentice H. Marshall, *Judge.*

SUBMITTED MAY 4, 1982*—DECIDED MAY 18, 1982

Before CUMMINGS, *Chief Judge*, ESCHBACH, and POSNER, *Circuit Judges.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). The appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

PER CURIAM. In this case we are asked to decide whether an appellee should be awarded damages and costs pursuant to Fed. R. App. P. 38[1] for his efforts in response to an attempted appeal from an obviously non-appealable order, and if so, against whom the damages and costs should be assessed.

The complaint in this action was filed in December, 1974 by the plaintiff-appellee, Victor Maneikis, against the defendants, Van Metre Lund and Wilmer Jordan. Maneikis, the licensee of a certain product, alleged that the defendants defrauded him into entering into a license agreement. In response to the complaint, the defendants filed a counterclaim. Subsequently, in an attempt to expedite this litigation, the parties negotiated an agreement whereby the plaintiff promised to forego certain discovery if the defendants voluntarily dismissed their claim. Accordingly, on March 20, 1978, the court entered an order dismissing the counterclaim. On August 27, 1979, however, defendant Jordan, the present appellant, moved for leave to reinstate that claim.[2] On October 6, 1980, the court entered an order denying that motion. Jordan now attempts to appeal from that order.

The initial question in this case is whether we have jurisdiction over this matter. The appellant's explanation of the basis of our jurisdiction consists of the unsupported claim that "the trial court's denial of reinstatement constitutes a final order which adjudicates substantial rights of defendant/counter-plaintiff Jordan."[3]

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[1] Rule 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

[2] The motion was based on the ground that the appellant had not received an "expedited trial." Defendant Lund did not join in the motion.

[3] The appellant also makes reference to this Court's "supervisory power." Apparently that is an attempt to invoke the All Writs Act, 28 U.S.C. § 1651(a). The appellant, however, has completely failed to demonstrate that this is an "exceptional circumstance" in which an extraordinary writ would be ap-

(Footnote continued on following page)

Although that statement appears to acknowledge the "general principle that only *final* decisions of the federal district courts [are] reviewable on appeal," *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), it completely ignores the fact that this is a multiple claims litigation. See *Cold Metal Process Co. v. United Co.*, 351 U.S. 445 (1956); 9 Moore's Federal Practice ¶110.09 (2d ed. 1980). In such an action, the basic rule is that "any order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties. . . ." Fed. R. Civ. P. 54(b). Such an order is not an appealable "final decision" under 28 U.S.C. § 1291. *Local P-171, Etc. v. Thompson Farms, Co.*, 642 F.2d 1065 (7th Cir. 1981).

An exception to the basic rule can arise if the district court, pursuant to Rule 54(b), directs "the entry of a final judgment as to one or more but fewer than all of the claims or parties . . . upon an express determination that there is no just reason for delay. . . ." In this case, however, the court neither directed the entry of judgment nor made the requisite certification. See *U.S. General, Inc. v. City of Joliet*, 598 F.2d 1050, 1051 n.1 (7th Cir. 1979). Despite the appellant's characterization, the district court's order is not a "final decision" within the meaning of Section 1291. Thus it is not appealable under that statutory provision. Accordingly, we dismiss this appeal for want of jurisdiction.[4]

This disposition leads us to the more novel issue in this case: whether the appellee should be awarded damages

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[3] *continued*
propriate. See *Will v. United States*, 389 U.S. 90 (1967); *Evanson v. Union Oil Company of California*, 619 F.2d 72 (Temp. Emer. Ct. App.), certiorari denied, 449 U.S. 832 (1980); 9 Moore's Federal Practice ¶110.28 (2d ed. 1980). Further, his failure to file a proper petition for a writ, see Fed. R. App. P. 21, suggests that this reference is simply an afterthought.

[4] The appellant suggests no other statutory basis for this court's jurisdiction. See Circuit Rule 9(b).

and costs under Rule 38.[5] In *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980), we explained that in order to make an award under the rule, we must make two determinations: (1) that the appeal is frivolous, and (2) that, in our discretion, we consider the appeal an appropriate one for the imposition of a sanction.

The first component of this two-tier analysis relates primarily to the merit of the party's legal position. Although we have cautioned that frivolousness in this context "means something more to us than an unsuccessful appeal,"[6] we have also recognized that, in certain cases, the law may be "so clear and well established" that the moving litigant's position is simply untenable. *N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551, 555 (7th Cir. 1975). We think that this case fits the latter mold.

"Finality" lies at the heart of appellate jurisdiction. *Carson v. American Brands, Inc., supra.* The appellant, however, makes only the most perfunctory attempt to demonstrate his compliance with that essential threshold requirement. His assertion that the district court's order is "final" is simply unsupported. Moreover, after the appellee raised the jurisdictional issue in his brief, the

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[5] In his brief the appellee requests an award under both Rule 38 and 28 U.S.C. § 1912. The Advisory Committee Notes to Rule 38 make clear, however, that § 1912 damages are imposed essentially for delay, whereas damages under the rule may be imposed if an appeal is frivolous even without a "showing that the appeal resulted in delay." Because allegations of delay are not explicitly made in this case, we will restrict our inquiry to the rule.

[6] Thus an appeal, though based on a questionable legal position, may not be deemed frivolous if, *inter alia*: the underlying litigation is complex or confusing, *National Acceptance Company of America v. Frigidmeats, Inc.*, 627 F.2d 764 (7th Cir. 1980); the appeal presents an issue of first impression, *Marquardt v. North American Can Corp.*, 652 F.2d 715 (7th Cir. 1981); or the appeal challenges a finding that is not "mandatory," *i.e.*, a credibility determination, *N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551 (7th Cir. 1975).

appellant made no attempt to respond. Rather, he continued to rely on his cryptic jurisdictional statement. Under these circumstances, we find the instant appeal frivolous.[7]

We thus turn to the second inquiry under Rule 38: whether the appeal is an appropriate one for the imposition of a sanction. This step reflects a concern for the underlying purposes of the rule. Damages and costs are awarded under Rule 38 "as a matter of justice to the appellee and as a penalty against the appellant." Fed. R. App. P. 38, Notes of Advisory Committee on Appellate Rules; see *Ruderer v. Fines*, 614 F.2d at 1132.

In this case, the appellee has incurred needless costs to protect his interests in this Court. Moreover, the appellant, ignoring a basic legal predicate, has imposed an unnecessary burden on this Court, and in so doing, has also infringed on the rights of legitimate litigants who are entitled to a prompt adjudication of their claims. See *Ruderer v. Fines*, 614 F.2d at 1132 ("The penalty aspect of the rule serves to vindicate public in-

[7] This conclusion is consistent with our finding in *Mancuso v. Indiana Harbor Belt Railroad*, 586 F.2d 553 (7th Cir. 1978), that an appeal from an order to show cause why an attorney should not be suspended from the practice of law was frivolous. In that case, we found it "crystal clear" that the order was not final. It also finds support in decisions of other circuits. In *Self v. Self*, 614 F.2d 1026 (5th Cir. 1980), the Fifth Circuit dismissed an appeal from a remand order for want of jurisdiction. The court found the appeal frivolous, noting that a "review of the applicable jurisprudence establishes, beyond pale, that this Court has no jurisdiction to entertain this appeal." *Id.* at 1028. Likewise, in *Good Hope Refineries, Inc. v. R. D. Brashear*, 588 F.2d 846 (1st Cir. 1978), the First Circuit found an appeal from an interlocutory order of a bankruptcy court, which clearly lacked "definitive operative finality," frivolous. Finally, it is reinforced by decisions that have found appeals in cases in which subject matter jurisdiction is clearly lacking to be frivolous. See *Cummings v. United States*, 648 F.2d 289 (5th Cir. 1981); *Simon & Flynn, Inc. v. Time Incorporated*, 513 F.2d 832 (2d Cir. 1975).

terests. . . ."). Thus we find that this is an appropriate case in which to impose sanctions under Rule 38.

In making that assessment in this case, however, we must also consider an additional factor. The specific problem in this appeal, disregard of the jurisdictional requirement, though attributable to the appellant, is in fact more a reflection of the incompetence or obstinancy of the appellant's attorney. See *Simon & Flynn, Inc. v. Time Incorporated, supra*, 513 F.2d at 835 ("Counsel must realize that the decision to appeal should be a considered one . . . , not a knee-jerk-reaction to every unfavorable ruling."). He must have known that the order was not final, yet he nevertheless took an unwarranted procedural step. See *Mancuso v. Indiana Harbor Belt Railroad, supra*. Both the Illinois Code of Professional Responsibility and the Model Code of Professional Responsibility explicitly caution that an attorney shall not "knowingly advance a claim . . . that is unwarranted under existing law . . . [unless] it can be supported by a good-faith argument. . . ." Ill. Rev. Stat. ch. 110A, foll. ¶ 771, Rule 7-102(a)(2); Model Code of Professional Responsibility DR 7-102(A)(2) (1980). Here the attorney has offered no justification.

To impose damages and costs against the appellant in these circumstances, though justified, would not guarantee that this attorney will be directly affected nor that he will be deterred from repeating such a tactic in a future case. Thus we conclude that it would be more purposeful to assess the damages and costs arising from this appeal against the attorney personally pursuant to 28 U.S.C. § 1927.[8] See *Self v. Self, supra*; *Good Hope Refineries, Inc. v. R. D. Brashear, supra*.

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[8] Section 1927 provides: "Any attorney . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Accordingly, we remand this case to the district court for a determination of the amount of damages and costs to be paid to the appellee, and direct that those expenses be assessed against the appellant's attorney.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILMER C. JORDAN
and SHELDON R. WAXMAN,

Petitioners,

v.

VICTOR MANEIKIS,

Respondent.

On Petition For Writ Of Certiorari Or In The Alternative Mandamus To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Is an order denying leave to reinstate a previously-dismissed counterclaim appealable when: (a) it is not a final decision pursuant to the provisions of 28 U.S.C. §1291; (b) certification for interlocutory appeal pursuant to the provisions of 28 U.S.C. §1292(b) has neither been requested nor granted; and (c) a finding pursuant to Rule 54(b) of the Federal Rules of Civil Procedure regarding appealability has neither been requested nor made?

When a party and his lawyer take a clearly frivolous appeal, is it a violation of due process to assess damages pursuant to the terms of Fed. R.App.P. Rule 38 and 28 U.S.C. §1927?

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In The

Supreme Court of the United States

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COUNTERSTATEMENT OF THE CASE

Proceedings Before The District Court

A motion to dismiss the original counterclaim was granted because the pleading was unintelligible. A motion to dismiss the amended counterclaim was denied in the following minute order:

> "Although defendant-counterclaimants Jordan and Lund are represented by counsel, their counterclaim is reminiscent of the complaint in *Dioguardi v. Durn-*

> *ing*, 135 F.2d 774 (2nd Cir. 1944); it is entitled to the same liberal construction as was Mr. Dioguardi's complaint. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The motion to dismiss the counterclaim is denied and plaintiff-counterdefendant is ordered to answer in 20 days."

Attempts to ascertain the nature and parameters of the counterclaim were frustrated by defendants' refusal to comply with discovery. As a result of defendants' refusal to comply with orders compelling discovery, the magistrate to whom discovery had been assigned entered two separate orders recording his "strongest possible recommendation" that the counterclaim be dismissed and, *sua sponte*, ordered defendants to appear before the district court to show cause why they should not be held in contempt of court. The magistrate entered two separate orders awarding plaintiff his costs and attorneys' fees with regard to the discovery matters and, in the second order, provided that 25% of this amount should be paid by defendants' counsel* pursuant to the provisions of 28 U.S.C. §1927.

In the course of proceedings before the district court concerning these matters, Petitioner Waxman (who now represented Jordan) suggested that the counterclaim be dismissed and additional discovery be dropped. The parties thereafter met and agreed to abandon contemplated discovery relating to the counterclaim and, in return, agreed to the dismissal of the counterclaim. An agreed order was thereafter entered dismissing the counterclaim. However, six months later (at the time a co-defendant entered into a settlement agreement with plaintiff), Petitioner Waxman presented a motion seeking

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* This assessment was against Petitioner Jordan's *previous* counsel. Petitioner Waxman had not yet assumed Jordan's representation in the case.

to reinstate the counterclaim on behalf of Petitioner Jordan. (The remaining non-settling defendant, Van Metre Lund, did not join in the motion to reinstate the counterclaim although he had previously been a counter-plaintiff.)

As indicated above, there had been substantial uncertainty as to the nature of the cause of action sought to be stated in the counterclaim. The motion for reinstatement, however, for the first time explicitly designated the counterclaim as a claim for malicious prosecution.*

The District Court declined to reinstate the counterclaim, but did not enter a written order to that effect at that time. Subsequently, on October 1, 1980, Petitioner Waxman again raised the issue of reinstating the counterclaim on behalf of Petitioner Jordan. (Again, defendant Lund did not join in this motion.) This time, the District Court entered a written order denying the motion to reinstate the counterclaim, and it was from this written order denying reinstatement that Jordan appealed. (Defendant Lund did not join in the appeal.)

Proceedings Before The Court Of Appeals

After receiving a four-week extension of time, Petitioners filed a seven-page Appellants' Brief, which brief failed to contain any statement as to the basis of the court's jurisdiction. The next day after filing the brief, Petitioners filed a motion for expedited briefing and suggested that the Court dispense with oral argument.

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* The second paragraph of the two-paragraph motion for reinstatement read in its entirety:

> "A cause of action for malicious prosecution commences with a verdict in favor of the Defendant. Rather than starting anew after a favorable verdict, Jordan desires that the same jury assess the motivation of Plaintiff for filing and continuing with this lawsuit, which is at the crux of the allegations of the counter-claim."

Plaintiff filed his Appellee's Brief and argued, *inter alia*, that Petitioners were attempting to take an appeal from a non-appealable order. Plaintiff further asserted that he was entitled to relief pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1912. Petitioners never filed, nor sought to file, a reply brief.

Meanwhile, in response to Petitioners' suggestion that oral argument be dispensed with, the Court of Appeals requested the parties to file statements concerning the need for oral argument. In response to this request, Petitioners reversed their previous position and asserted that oral argument was appropriate. In a subsequent motion filed by Petitioners, Petitioners clarified that the total amount of time required for oral argument of this appeal by Petitioners would be *one minute*. ("Jordan's Motion To Set Oral Argument For June 15, 1981" is reproduced in the Appendix hereto.)

After reviewing the briefs, the record, the parties' statements concerning the need for oral argument, and Petitioners' motions in that regard, the Court of Appeals took the case on the briefs and handed down the decision which is the subject of the instant Petition. Petitioners responded to the Court's decision with a Petition For Rehearing With En Banc Suggestion. In that petition, Petitioners suggested for the first time that the order might be appealable under the "collateral orders" exception of *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 551 (1949). Petitioners limited themselves to an argument by assertion in this regard, and made no attempt to explain how the order denying reinstatement of the malicious prosecution counterclaim fit within the *Cohen* exception. The petition was denied.

REASONS FOR DENYING THE WRIT

1. The decision below regarding the non-appealability of the order in question is so plainly correct as to require no argument; indeed, Petitioners did not even *claim* that the order in question was appealable under either 28 U.S.C. §1291, 28 U.S.C. §1292(b), or Fed.R. Civ.P. Rule 54(b). The assertion (made for the first time in the petition for rehearing) that the order was appealable under the collateral order doctrine has never been explained and does not withstand scrutiny: The refusal to reinstate a counterclaim for malicious prosecution presents no important or unsettled question of law; does not lose the ability to be reviewed effectively once a final judgment is entered in the entire action; is not separate and independent of the main cause of action; and presents no danger of denying the appellant his day in court. To the contrary, Petitioner Jordan, as a matter of law, is not entitled to *commence* an action for malicious prosecution until he first wins the underlying suit. The Petition raises no legitimate question, much less one of sufficient moment to merit this Court's consideration.

2. There is nothing novel nor of constitutional dimension about the lower court's application of Fed.R.App.P. Rule 38 and 28 U.S.C. §1927 to the facts of this case, nor in its having done so on the basis of the briefs and the record without first having held a one-minute oral argument. Again, the Petition fails to raise a substantial question.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VICTOR MANEIKIS,

Plaintiff-Appellee,

No. 80-2528 *v.*

WILMER C. JORDAN, et al.,

Defendants-Appellants.

JORDAN'S MOTION TO SET ORAL ARGUMENT FOR JUNE 15, 1981

NOW COMES Defendant-Appellant, WILMER C. JORDAN, by and through his attorney, SHELLY WAXMAN, and moves to set Oral Argument for June 15, 1981 for the following reasons:

1. June 15, 1981 is convenient to Jordan's counsel for oral argument as several other appeals of his were scheduled for oral argument on that same date.

2. The same panel should decide all of Jordan's counsel's clients' appeals.

3. A motion simultaneously herewith has been filed in *Waxman v. City of Chicago, et al.*, Docket No. 80-1897, to also set a June 15, 1981 oral argument in that appeal. Therefore, the granting of that motion along with this one would set all of counsel's clients' pending appeals for disposition on the same date, except *Hoff* and *Thomas K. Stewart #2.*

4. Only two minutes total would be required for both *Waxman* and this appeal (one minute for each would suffice) and, therefore, the granting of this Motion and the one in *Waxman* would be in furtherance of judicial economy, expediency and efficiency.

Respectfully submitted,

WILMER C. JORDAN

By: SHELLY WAXMAN
His Attorney

CERTIFICATE OF SERVICE

TO: John G. Jacobs
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I, SHELLY WAXMAN, hereby certify that copies of the foregoing Motion were mailed to the above-named individuals at their respective addresses, with postage prepaid, on May 21, 1981.

/s/ SHELLY WAXMAN

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